Editor's note: Appealed -- aff'd, Civ.No. C74-151 (D.Wyo. Nov. 7, 1975)
pages 133 through 138 (appeal procedures and excerpts from 43 CFR Part 4) are not included.

UNITED STATES
v.
A. F. ANDERSON ET AL.

IBLA 74-113 Decided March 20, 1974

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., declaring various placer mining claims null and void for the lack of a discovery of valuable mineral deposits.

Affirmed.

Mining Claims: Lands Subject to

Mining locations made on land segregated from operation of the mining laws are null and void ab initio.

Mining Claims: Discovery: Generally--Mining Claims: Determination of Validity--Mining Claims: Hearings

Mining claim locations, upon which no discovery of a valuable mineral deposit is demonstrated at a hearing following due process, are properly declared null and void.

APPEARANCES: Clement Theodore Cooper, Esq., Washington, D. C., for appellants; Albert V. Whitham, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This is an appeal by various appellants 1/ from a decision of Administrative Law Judge John R. Rampton, Jr., in Wyoming Contest

1/ The parties on appeal are: A. F. Anderson, Wilton C. Dale, William F. Mackey, Arthur Roberts, Kenneth Roberts, Hugh Scott, Esther T. Desmarais, Louis O. Desmarais, Ernest L. Meunier, and Irene V. Meunier. We note that Merle I. Zweifel, a co-locator of all of the claims, filed a notice of appeal which was received by

Nos. W-28091, W-28124, and W-28126, declaring 102 placer mining claims null and void for lack of discovery of a valuable mineral deposit. On appeal a number of varying factual and legal contentions are pressed. We affirm the Judge's decision and adopt his opinion with one modification.

In his decision the Judge excluded from his consideration assay results obtained from grab samples made prior to the hearing but after the lands had been withdrawn from all mineral location. He reasoned that exclusion of such evidence was mandated by the requirement that "[a] discovery must be perfected on each claim prior to the segregation of the lands from mineral entry." (Dec. at 6) While we fully agree that a discovery must occur prior to segregation of the land, we do not believe that such a requirement necessitates the exclusion of the assay results. As we recently held in United States v. Foresyth, 15 IBLA 43 (1974), the requirement that a discovery must occur prior to any withdrawal of the land from mineral location does not preclude the taking of samples from pre-existing exposures within the limits of the claim. Id. at 47- 49.

Turning to the assay reports (Exhibit M to S) we are unable to find that they in any way affect the validity of the Judge's conclusion. These assay reports were spectrographic analyses of the grab samples (taken, we would note on 7 of 102 claims). Similar assay reports were also submitted in United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973). Therein, this Board held that: "[t]he assay reports are of no probative value in determining the existence of a discovery on any particular claim." Id. at 68, 80 I.D. at 330. We find that in the instant case as well we are unable to assign any probative weight to the assay results submitted.

Our independent review of the entire record leads inexorably to the conclusion that the Judge's finding of invalidity is manifestly sound. In regard to appellants' various legal contentions we merely note that these same contentions, among others, were exhaustively examined in United States v. Zweifel, supra, and found to be without merit. No useful purpose would be served in reiterating them.

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fn. 1 (Cont.)
the Administrative Law Judge on October 23, 1973. A copy of the Judge's decision was served upon appellant's agent on September 11, 1973. Under the provisions of 43 CFR 4.411(a), the notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision being appealed. Inasmuch as the notice of appeal was not filed within the 10 day grace period afforded by 43 CFR 4.401(a), dismissal of the appeal by Merle I. Zweifel is required. See Margaret Chicharello, 9 IBLA 124 (1973); cf. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

The Administrative Law Judge, having found the claims to be invalid or null and void for reasons stated in his decision, felt no compulsion to rule on the other charges in the complaint. Similarly, we see no reason to burden the record with an examination of these issues.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

September 4, 1973

DECISION

UNITED STATES OF AMERICA,	:	Contest W-28091
	:	
Contestant	:	Involving the Owl Placer
	:	Mining Claims Nos. 1-32
v.	:	inclusive, located in
	:	Sections 20, 21, and 28-33
MERLE I. ZWEIFEL,	:	inclusive, T. 13 N., R. 96 W.,
A. F. ANDERSON,	:	6th P.M.; Wendy Placer Mining
WILTON DALE,	:	Claims Nos. 1-8 inclusive and
WILLIAM F. MACKEY	:	13-20 inclusive, located in
ARTHUR ROBERTS,	:	Sections 25, 26, 34 and 35,
KENNETH ROBERTS,	:	T. 14 N., R. 97 W., 6th P.M.;
HUGH SCOTT,	:	all located in Sweetwater
ESTHER T. DESMARAIS,	:	County, Wyoming.
LOUIS O. DESMARAIS,	:	
ERNEST L. MEUNIER,	:	
and IRENE V. MEUNIER,	:	Contest W-28124
	:	
Contestees	:	Involving Crawfish Placer
	:	mining claims Nos. 1-8 in-
	:	clusive, 13-40 inclusive,
	:	located in Sections 21-28
	:	inclusive, 34 and 35, T. 14 N.,
	:	R. 95 W., 6th P.M., Sweetwater
	:	County, Wyoming.
	:	
	:	
	:	Contest W-28126
	:	
	:	Involving the Lazy Day Nos. 1-20
	:	inclusive Placer Mining Claims
	:	located in Sections 29-33 in-
	:	clusive, T. 14 N., R. 95 W.,
	:	6th P.M., Sweetwater County
	:	Wyoming.

Statement of the Case

Wyoming Contests W-28091, W-28124 and W-28126 were filed October 28, 1971. The complaints filed in the three contests contained the same five charges of invalidity:

A. No discovery of valuable, locatable mineral deposits within the meaning of the mining laws has been made within the limits of any of the claims.

B. Valuable, locatable mineral deposits were not found on any of the claims at a time when the lands covered by the claims were subject to location.

C. No compliance has been made by the locators or their agents with the requirements of Wyo. Rev. Statutes of 1957, #30-10 in that no notice was fixed upon any of the claims and there was no designation of the surface boundaries by substantial posts or stone monuments at the corners of any of the claims.

D. No compliance has been made by the locators or their agents with the requirements of Section 2324 of the Revised Statutes (30 U.S.C. 28) in that none of the alleged mining claims were distinctly marked on the ground so the boundaries of the claims could be readily traced.

E. Annual assessment work substantially complying with the requirements of Section 2324 of the Revised Statutes (30 U.S.C. 28) has not been performed for the benefit of any of the claims.

By a prehearing conference order dated May 2, 1972, the three contests were consolidated for hearing, and a hearing was held in Denver, Colorado, July 8 through 21, 1972.

The validity of four groups of placer mining claims was in issue, the Owl 1-32, the Wendy 1-8 and 13-20, the Crawfish 1-8 and 13- 40, and Lazy Day 1-20.

Findings and Conclusions

The Owl group was located January 20, 1967 (Contestant's Ex. 4); the Lazy Day group was located November 15, 1966 (Contestant's Ex. 5); the Wendy group was located November 15, 1966 (Contestant's Ex. 6); the Crawfish group was located February 1, 1967 (Contestant's Ex. 7). All claims under contest were located by Merle I. Zweifel, for himself and as agent for all co-locators whose names appear on the location certificates and who were named as contestees in the complaint.

The land covered by the mining claims in contest is entirely included within Township 14 North, Range 95 West, Sections 1-36, inclusive; Township 13 North, Range 96 West, Sections 1-36, inclusive; and Township 14 North, Range 97 West, Sections 1-36, inclusive.

The Crawfish Placer Mining Claims

By memorandum dated January 26, 1967, directed to the Land Office Managers, Cheyenne-Denver-Salt Lake City, the Director of the Bureau of Land Management applied for withdrawal from appropriation under the mining laws, insofar as they apply to metalliferous minerals, of all oil shale deposits and all lands containing such deposits in Colorado, Utah and Wyoming. This application was noted in the Miscellaneous Index Record of the Wyoming Land Office on January 27, 1967, and was published in the Federal Register, Vol. 32, January 28, 1967. Public Land Order 4522 dated September 13, 1968, and published in the Federal Register, Vol. 33, September 24, 1968, withdrew from location under the mining laws, all of the land covered by the claims in contest together with other land described in that order.

All of the Crawfish group was located on February 1, 1967. The land on which the Crawfish claims were located was withdrawn from appropriation under the mining laws on

January 27, 1967, which was the date of the notation of the application for withdrawal in the Miscellaneous Index Record of the Wyoming Land Office. From and after this date, the lands were segregated from location for metalliferous minerals and claims located subsequent to that date are null and void ab initio. Since the Crawfish 1-8 and 13-40 were located on February 1, 1967, they must be and are hereby held to be void. See 43 CFR 2351.3 (1972); Mrs. Ethel H. Meyers, 65 I.D. 207 (May 5, 1958); Marion Q. Kieser, 65 I.D. 485 (Nov. 25, 1958).

Discovery

Charge No. A

Mr. Zweifel testifying on his own behalf stated that aluminum is the mineral allegedly discovered on the claims and on which the contestees rely as ". . . the valuable discovery" (Tr. 175). He stated that at the time of location of the claims he took samples from most of them (Tr. 207), and that they were taken in 1966 and 1967 (Tr. 94). He dug potholes from six inches deep to not more than two feet in depth (Tr. 93, 102, 118), but did not dig trenches or excavations having any particular lateral dimensions (Tr. 94). He took samples at times from the potholes he had dug from the surface of the ground and outcrops (Tr. 103). He identified the samples as a tan rock (Tr. 95, 128), a red rock (Tr. 104), a yellow rock (Tr. 129), and "consolidated clay" (Tr. 121). These samples consisted of from one-half pound to one pound of rock or other material (Tr. 210). He could not identify any samples with any of the individual claims as he did not mark the samples for identification as he took them (Tr. 172). He placed the samples in bags and took the samples to Shawnee, Oklahoma, where he ". . . just piled them up . . ." but had no occasion to save them (Tr. 211); he did not have them assayed (Tr. 172, 211).

Mr. Zweifel stated it was his intention to return to the claims and complete his exploration (Tr. 211-238). He did not return to the claims from the time of his location in 1966, 1967, until July 11 and 12, 1972 (Tr. 118), and has done no work on the claims in contest (Tr. 119). He admitted he was not a chemist, mining engineer or geologist (Tr. 51).

He further testified: "Well, if you are trying to say that I was competent to determine with actuality that I made a discovery when I picked up a rock, that isn't true. I am not an assayer. Those must be confirmed by an assayer, someone of responsibility." He had retained none of the samples taken in 1966 and 1967, in regard to any of the claims in contest (Tr. 172, 211).

In substance, Mr. Zweifel's testimony is that in November 1966, January 1967, and February 1967, he went upon the claims, picked up or dug from or near the surface of the ground on each claim, a piece of hard rock or clay not to exceed one pound in weight, placed them in bags, hauled them to Shawnee, Oklahoma, where he piled them up and then disposed of these samples without having them assayed. He had no knowledge of what the samples contained or whether they were valuable, and he admitted he could make no such determination without having them assayed.

The long-established rule as a test for determining what constitutes a discovery of valuable mineral deposits was first set forth in Castle v. Womble, 19 L.D. 455, 457 (1894), in which the Secretary stated:

> . . . [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

The Supreme Court has expressed its approval in a number of decisions. United States v. Coleman, 390 U.S. 599, 602 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Chrisman v. Miller, 197 U.S. 313, 322 (1905). Another test to complement the prudent man rule was approved in Coleman, supra. It is the so-called "marketability test." The Court said at p. 602-03:

> . . . Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost

> of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used here merely recognizes this fact.

The marketability test was explained further in Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). The court felt present marketability was necessary. It stated at 83:

> The "marketability test" requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained.

The record is devoid of any evidence which, by any interpretation of the prudent man rule, would justify a conclusion that a discovery within the meaning of the mining laws had been made upon the claims in question.

Indeed, the issue of discovery can readily be decided on the basis of Mr. Zweifel's testimony alone, with complete disregard for the testimony given by the Government mining engineers. His sampling at the time of location was meaningless, and his expertise in recognizing mineralization without assays being made of the sampling taken was nil. By his own admissions, Mr. Zweifel has convincingly demonstrated that no discovery was made upon any of the claims at the times of location.

The contestees produced assay reports of sampling taken from the claims in July of 1972. No attempt will be made in this decision to analyze the information contained in these reports because the lands which are located were withdrawn from mineral entry on January 28, 1967, when the notation of the request for withdrawal was made on the Bureau of Land Management Land Office records in Cheyenne. A discovery must be perfected on each claim prior to the segregation of the lands from mineral entry. This was not done and the Owl 1 through 32, Wendy 1 through 8 and 13 through 20, and the Lazy Day 1 through 20 claims are declared to be void.

In the light of the above ruling, there appears to be no merit to a further discussion and ruling on the evidence involved with respect to the other allegations of the complaint. To do so would be an expenditure of time and effort clearly unjustified.

John R. Rampton, Jr.
Administrative Law Judge

Distribution:

Editor's note: pages 133 through 138 (appeal procedures and excerpts from 43 CFR Part 4) have been omitted.